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DA 98-2564

In the Matter of

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MM Docket No. 95-49
RM-8558

Released: December 18, 1998

1. The Commission has before it a petition for reconsideration of the Report and Order ("R&O"), 12 FCC Rcd 6809 (1997), in this proceeding, dismissing and granting mutually exclusive proposals to amend the FM Table of Allotments. The petition was filed jointly by Roy E. Henderson and Tichenor License Corporation ("Henderson, Tichenor, or petitioners"). Maxagrid Broadcasting Corporation ("Maxagrid") filed an opposition. The petitioners filed a joint reply. We will deny the petition for reconsideration.¹

2. This proceeding originated with a rulemaking petition filed by Maxagrid, licensee of Station KBAE(FM), Channel 284C3, Llano, Texas, seeking the substitution of Channel 285C3 for Channel 284C3 at Llano, the reallocation of Channel 285C3 to Marble Falls, Texas, and the modification of the Station KBAE(FM) license to specify operation on Channel 285C3 at Marble Falls. Since Station KBAE(FM) is the sole, local aural service in Llano, Maxagrid also proposed to allot Channel 242A to Llano as a replacement channel.

¹ The joint petitioners also filed a motion for stay, which we will dismiss as moot in view of our actions taken in this Memorandum Opinion and Order. After the pleading cycle ended, Tichenor filed a motion requesting a global resolution of this proceeding. Maxagrid opposed this motion, and Tichenor replied. See *infra* at paras. 13-14.

proposing the requested substitution, reallocation, and change of community of license for Station KBAE(FM). However, the NPRM did not propose the allotment of Channel 242A to Llano because Maxagrid had not committed to apply for that channel.

4. In response to the NPRM, Maxagrid filed comments, expressing an interest in applying for Channel 242A at Llano and a continued interest in operating Station KBAE(FM) on Channel 285C3 at Marble Falls. In addition, Henderson, licensee of Station KLTO(FM), Channel 285A, Rosenberg, Texas, filed a counterproposal proposing the reallocation of Channel 285A to Katy, Texas, and the modification of the Station KLTO(FM) license to specify operation at Katy.²

5. After the pleading cycle ended, the Commission issued a Further Notice of Proposed Rule Making, 11 FCC Rcd 12647 (1996) ("FNPRM"), proposing the allotment of Channel 242A at Llano as a replacement channel because there was now an expression of interest in that allotment. In response to the FNPRM, Henderson filed a motion to withdraw his original counterproposal and jointly submitted a second counterproposal with Tichenor, licensee of Station KLTP(FM), Channel 285A, Galveston, Texas. The joint counterproposal sought to substitute Channel 285C3 for Channel 285A at Rosenberg, Texas, to reallocate Channel 285C3 to Missouri City, Texas, and to modify Henderson's license for Station KLTO(FM) to specify operation at Missouri City on the upgraded channel. To accommodate this proposal, the joint counterproposal requested the deletion of Channel 285A at Galveston, the allotment of Channel 242C2 to Menard, Texas, and the modification of the Station KLTP(FM) license to specify operation on Channel 242C2 at Menard.

6. The R&O dismissed Henderson's first counterproposal as requested³ and rejected the joint counterproposal as unacceptable for consideration. While the R&O recognized that the allotment of Channel 242C2 at Menard was mutually exclusive with the allotment of Channel 242A at Llano and could have been considered if it were a request for an allotment for a new station, the counterproposal could not be entertained because it violated Section 1.420(i) of the Commission's Rules. This section allows an FM or television station to amend the FM or Television Table of Allotments and to modify its authorization to specify a new community of license when the amended allotment would be mutually exclusive with the station's present allotment.⁴ Since Tichenor was in effect requesting the reallocation of its Station KLTP(FM) from Channel 285A at Galveston to Menard on non-mutually exclusive Channel 242C2, this

² The proposed reallocation of Channel 285A to Katy was mutually exclusive with Maxagrid's proposed reallocation of Channel 285C3 at Marble Falls. In addition, this counterproposal also required Station KBUK(FM), Channel 285A, LaGrange, Texas, to reallocate its channel to Smithville, Texas, and relocate its transmitter site.

³ In approving the dismissal, the R&O noted that Henderson had represented that no consideration was received in exchange for withdrawal of the counterproposal, thereby demonstrating compliance with Section 1.420(j) of the Commission's Rules.

⁴ Under such circumstances, the Commission will not afford other interested parties an opportunity to file competing expressions of interest in the proposed new channel.

proposal could not be considered. The R&O also interpreted the wording in the joint counterproposal as proposing a change in community of license for the Galveston station and not simply a "drop-in" allotment at Menard -- that is, a new FM allotment that would be open to competing applications. The R&O further found that the other part of the joint counterproposal involving the reallocation of Henderson's Station KLTO(FM) from Rosenberg to Missouri City on Channel 285C3 was untimely and should have been submitted in response to the original NPRM.

7. Having dismissed the two counterproposals, the R&O then substituted Channel 285C3 for Channel 284C3 at Llano, reallocated Channel 285C3 to Marble Falls, and modified Maxagrid's license for Station KBAE(FM) accordingly because this would result in a first local aural service to Marble Falls (population 4,007). In addition, the R&O allotted Channel 242A to Llano (population 2,962) to ensure that the community's sole local service is retained and conditioned the grant of operating authority for the Marble Falls station until a construction permit has been issued for Channel 242A at Llano and service has been initiated on that channel.⁵

Petition for Reconsideration

8. The petitioners argue that the R&O erred in dismissing the joint counterproposal in two respects. First, they contend that the R&O incorrectly concluded that the portion of the counterproposal involving the reallocation of upgraded Channel 285C3 to Missouri City, Texas was untimely and should have been filed by the comment deadline in the NPRM. In support of this position, they contend that Channel 285C3 at Missouri City is not mutually exclusive with Channel 285C3 at Marble Falls and could not, therefore, have been accepted as a counterproposal to the allotment proposed in the NPRM. Rather, they argue that the entire joint counterproposal was properly filed in response to the FNPRM, proposing the allotment of Channel 242A at Llano. Petitioners note that their joint counterproposal requires that Channel 285A at Galveston, TX, be relocated and requested that it be reassigned as Channel 242C2 at Menard, TX. Since Channel 242C2 at Menard is mutually exclusive with Channel 242A at Llano as proposed in the FNPRM, they claim it meets the requirement that a counterproposal be in conflict with a proposal made in the proceeding. In addition, they argue that it was timely filed in response to the FNPRM and complied with the Commission's technical requirements, thereby making it acceptable for consideration.

9. Second, the petitioners maintain that the R&O erred in holding that the Tichenor portion of the counterproposal violated Section 1.420(i) of the Commission's by proposing a reallocation and change in community of license for Station KLTP(FM) on a channel that is not mutually exclusive with its current channel at Galveston. While they acknowledge that the

⁵ After the R&O was released, three applications were filed for Channel 242A at Llano, of which one application had been submitted by Maxagrid.

counterproposal did contemplate the use of Section 1.420(i) for the Missouri City reallocation,⁶ they contend that "corresponding" language was not used with respect to the Menard portion of the counterproposal. Rather, they claim that the counterproposal contemplated the deletion of Channel 285A at Galveston, which is currently being used by Tichenor's Station KLTP(FM), and the allotment of Channel 242C2 at Menard as a "drop-in" allotment open to general application. In support of this position, they cite the following language from the joint counterproposal as indicating such an intent:

Both Henderson and Tichenor are fully committed to the counterproposals set forth herein.

[And Tichenor commits to] . . . take all necessary actions to build and operate the station in Menard as requested.

They assert that the language "take all necessary actions" includes applying for Channel 242C at Menard along with other applicants. Since the R&O recognized that a "drop-in" allotment of Channel 242C2 could have been accepted as a counterproposal, they conclude that the joint counterproposal should have been accepted on that basis.

Discussion

10. After carefully reviewing the record in this case, we will deny the petition for reconsideration. As a preliminary matter, we agree with the petitioners that the R&O erred in concluding that the portion of the joint counterproposal involving the reallocation of upgraded Channel 285C3 to Missouri City, Texas, was untimely and should have been filed by the comment deadline in the NPRM. As correctly noted by the petitioners, the Channel 285C3 proposal at Missouri City was not mutually exclusive with the original NPRM's proposal to reallocate Channel 285C3 to Llano and, therefore, could not have been accepted as a counterproposal with respect to the NPRM.⁷ However, we believe that this mistake constitutes harmless error because, as will be discussed below, the joint counterproposal was defective in another key respect and was properly dismissed by the R&O.

⁶ The petitioners point to the following language as indicating an intent to apply Section 1.420(i):

Since the assignment of channel 285C3 to Missouri City could not be made without deletion of that channel as presently assigned to KLTO in Rosenberg, the allotment of that channel to Missouri City would not be subject to outside expressions of interest.

Joint Counterproposal at 3.

⁷ This conclusion follows from the fact that the actual spacing between Channel 285C3 at Marble Falls and Channel 285C3 at Missouri City (283.2 kilometers) exceeds the required spacing (153 kilometers) for co-channel Class C3 stations under Section 73.207(a), Table A of the Commission's Rules.

11. In particular, we do not agree with the petitioners' contention that the R&O erred in dismissing the other portion of the counterproposal on the grounds that it violated Section 1.420(i) of the Rules and did not constitute a request for a "drop-in" allotment at Menard. We have reviewed the joint counterproposal in light of the language cited by the petitioners and conclude that the R&O reasonably interpreted their counterproposal as requesting a reallocation and change of community of license that would trigger Section 1.420(i) of the Rules. Our review reveals five instances in the counterproposal in which the petitioners explicitly requested or referred to their proposal as involving the modification of Station KLTP(FM)'s license to specify operation on Channel 242C2 at Menard.⁸ For example, Tichenor stated that:

[i]t affirms and commits that upon adoption of this entire counterproposal and the deletion of channel 285A from Galveston and the reallocation of that facility to KLTP as channel 242C2 in Menard, Texas, it will proceed to take all necessary actions to build and operate the station in Menard as requested.⁹

The R&O cited this language and correctly concluded that it could not be construed as a commitment to apply for Channel 242C2 as a new allotment for Menard subject to competing applications.¹⁰ Likewise, the two statements proffered by petitioners regarding their commitments to implement the counterproposal do not support their position that a "drop-in" allotment was requested for Menard because they are not specific enough and because they both appear in the same paragraph as the above cited language requesting a modification in the KLTP(FM) license from Galveston to Menard. While we acknowledge that the petitioners intended to use Section 1.420(i) for the Missouri City reallocation and that certain "corresponding language" was not used with respect to the Menard reallocation, we believe that the vast weight of the evidence supports the R&O's conclusion that a change of community of license was envisioned for the Galveston station. Since the proposed change of community of license for Station KLTP(FM) on Channel 242C2 at Menard is not mutually exclusive with its present use of Channel 285A at Galveston, the proposal was properly dismissed as violating Section 1.420(i) of the Rules.¹¹

⁸ Three of these statements are in the legal portion of the counterproposal at pages 3, 4-5, and 6-7. In addition, two statements are in the engineering section of the counterproposal at pages 4 and 5.

⁹ Joint Counterproposal at 6-7.

¹⁰ 12 FCC Rcd at 6811, para. 4.

¹¹ As a related matter, the petitioners contend that any defect with respect to their counterproposal has been cured by their subsequent statement in the reconsideration petition that they would accept a new allotment at Menard with a filing window open to competing applications. Petitioners' Joint Reply of August 13, 1997 at 6. We disagree. This new language materially changes the nature of their counterproposal from a change of community proposal to a "drop-in" allotment after the R&O was adopted in this proceeding and will not be considered. See,

12. Having made this determination with respect to the Galveston-Menard portion of the counterproposal, we also find that the remainder of the counterproposal involving Henderson's proposed upgrade and reallocation of Station KLTO(FM) from Rosenberg to Missouri City, Texas on Channel 285C3 cannot be entertained in this proceeding for two reasons. First, it was predicated upon the defective proposal to delete Channel 285A at Galveston and to modify Station KLTP's license on Channel 242C2 at Menard. Second, Henderson's proposed upgrade and modification of its Station KLTO(FM) license on Channel 285C3 at Missouri City does not conflict under the minimum distance separation requirements with the FNPRM's proposal to allot Channel 242A at Llano and is thus not mutually exclusive with the FNPRM. As a result, it cannot qualify as a counterproposal to the FNPRM.¹²

13. Request for Global Resolution. Approximately a year after the pleading cycle ended in this proceeding, Tichenor filed a pleading, suggesting a global resolution that would accommodate the parties to this proceeding and the three applicants for Channel 242A at Llano. Specifically, Tichenor proposes the simultaneous allotment of Channels 271A, 275A, and 293A to Llano in lieu of Channel 242A and the assignment of these channels to the three Llano applicants with cut-off protection. Since this allotment scheme would eliminate the conflict with Channel 242C2 at Menard, Tichenor also requests the grant of its counterproposal. Maxagrid opposes Tichenor's global resolution, claiming that it would require the commencement of a new rulemaking proceeding.

14. We cannot adopt this global resolution. Since the joint counterproposal was not accepted in this proceeding, it is not possible to make the allotments requested by Henderson and Tichenor at Missouri City, Galveston, and Menard. Further, we cannot allot additional channels at Llano at this stage of the proceeding because such an action would be beyond the scope of the FNPRM, which had proposed only one replacement channel at Llano. Although the R&O recognized the possibility that multiple applications could be filed for Channel 242A at Llano, it noted that three additional channels are available to accommodate such interests and that the Commission would entertain rulemaking petitions to allot additional channels as it did in Albion, Nebraska, 10 FCC Rcd 11927 (Comm. 1995). Indeed, one of the applicants for Channel 242A at Llano, Elgin FM, has filed a rulemaking petition to allot two additional channels at Llano, which could be considered in a separate rulemaking proceeding. Finally, contrary to Tichenor's claim, the Commission's decision in Churubusco, Indiana, 5 FCC Rcd 916 (Comm. 1990), does not obviate the need for notice and comment rulemaking for additional Llano allotments. In

e.g., Rosendale, New York, FCC 98-237 (Comm., released October 6, 1998) (it is not in the public interest to permit a rulemaking proponent to request that its license be modified to a commercial allotment, without entertaining competing expressions of interest, and once an unfavorable decision has been rendered, to submit an untimely alternative request to have its license modified subject to the condition that its operations be restricted to noncommercial educational use).

¹² In its opposition, Maxagrid contends that there are some other defects with the joint counterproposal that warrant its dismissal, and the petitioners argue to the contrary in their reply. In view of our affirming the dismissal of the joint counterproposal for the reasons set forth above, we need not reach these issues.

Churubusco, the Commission allotted alternate channels only to accommodate the proposals made in the NPRM and in timely filed and acceptable counterproposals.

15. As a final matter, we affirm the R&O's other actions taken with respect to Llano and Marble Falls as in the public interest for the reasons stated therein.

16. In view of the above, IT IS ORDERED, That the Joint Petition for Reconsideration filed by Roy E. Henderson and Tichenor License Corporation IS DENIED.

17. IT IS FURTHER ORDERED, That the Motion for Stay filed by Roy E. Henderson and Tichenor License Corporation IS DISMISSED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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